UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM TEJADA and EDUARDO ROSA, Individually and on Behalf of All Other Past and Present Similarly Situated Employees,
Plaintiffs,

-against-

OTTOMANELLI'S CAFÉ FRANCHISING CORP. d/b/a OTTOMANELLI BROTHERS NY GRILL, NICOLO OTTOMANELLI and JOSEPH OTTOMANELLI,
Defendants.

CASE NUMBER:
11 CV 2112(SAS)

DEFENDANTS' ANSWER TO AMENDED COMPLAINT (CLASS ACTION)

Defendants, OTTOMANELLI'S CAFÉ FRANCHISING CORP. d/b/a OTTOMANELLI BROTHERS NY GRILL, NICOLO OTTOMANELLI and JOSEPH OTTOMANELLI (collectively "Defendants") hereby answer Plaintiffs' Amended Complaint as follows:

1. Defendants **DENY** the allegations contained in paragraph "1" of the Amended Complaint but **ADMIT** that Defendants Nicolo Ottomanelli and Joseph Ottomanelli are principals of Ottomanelli's Brothers NY Grill ("Ottomanelli's Café").

2. Defendants **DENY** the allegations contained in paragraph "2" of the Amended Complaint, except **ADMIT** that Defendant Ottomanelli's Café is a small well-established restaurant located in New York City.

3. Defendants **ADMIT** the allegations contained in paragraph "3" of the Amended Complaint.

4. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph "4" of the Amended Complaint.

5. Defendants **ADMIT** the allegations contained in paragraph "5" of the Amended Complaint.

6. Defendants **ADMIT** the allegations contained in paragraph "6" of the Amended Complaint insofar as they relate to the time frame set forth in other allegations of the Amended Complaint.

7. Defendants **ADMIT** the allegations contained in paragraph "7" of the Amended Complaint insofar as they relate to the time frame relevant to this action.

8. Defendants **DENY** the allegations contained in paragraph "8" of the Amended Complaint.

9. Defendants **DENY** the allegations contained in paragraph "9" of the Amended Complaint, except **ADMIT** that Defendant Nicolo Ottomanelli served as principal and officer of Defendant Ottomanelli's Café.

10. Defendants **DENY** the allegations contained in paragraph "10" of the Amended Complaint.

11. Defendants **DENY** the allegations contained in paragraph "11" of the Amended Complaint, except **ADMIT** that Defendant Joseph Ottomanelli served as principal and officer of Defendant Ottomanelli's Café.

12. Defendants **DENY** the allegations contained in paragraph "12" of the Amended Complaint.

13. Defendants **DENY** the allegations contained in paragraph "13" of the Amended Complaint.

14. Defendants **DENY** the allegations contained in paragraph "14" of the Amended Complaint, except **ADMIT** that during certain calendar years between 2007 through 2010 inclusive gross receipts of Defendant Ottomanelli's Café exceeded $500,000.

15. Defendants **DENY** the allegations contained in paragraph "15" of the Amended Complaint, except **ADMIT** that during calendar years 2008, 2009 and 2010 gross receipts of Ottomanelli's Café exceeded $500,000.

16. Defendants **DENY** the allegations contained in paragraph "16" of the Amended Complaint.

17. Defendants **DENY** the allegations contained in paragraph "17" of the Amended Complaint.

18. Defendants **ADMIT** the allegations contained in paragraph "18" of the Amended Complaint.

19. Defendants **DENY** the allegations contained in paragraph "19" of the Amended Complaint except **ADMIT** that Ottomanelli's Café's employees prepared food, cooked food, washed dishes and delivered food, and further allege that Ottomanelli's Café was a small restaurant employing less than 15 employees who are not related to the Defendants Nicolo and Joseph Ottomanelli in any one year.

20. Defendants **DENY** the allegations contained in paragraph "20" of the Amended Complaint.

21. Defendants **DENY** the allegations contained in paragraph "21" of the Amended Complaint.

22. Defendants **DENY** the allegations contained in paragraph "22" of the Amended Complaint, but **ADMIT** that if a proper class is found to exist, the Defendants, their legal representatives, heirs, officers, assigns or successors, any family members of the individual Defendants who worked for Ottomanelli's Café or any individual who at any relevant period had a controlling interest in Ottomanelli's Café or acted as a bona fide supervisor or exempt employee as defined in the Fair Labor Standards Act ("FLSA") would be excluded.

23. Defendants **DENY** the allegations contained in paragraph "23" of the Amended Complaint and allege that the number of employees not related to Defendants Nicolo and Joseph Ottomanelli in any one year is less than 15 and the total number of employees during the period from 2007 through 2010 excluding members of the Ottomanelli family, and supervisors, is less than 16.

24. Defendants **DENY** the allegations contained in paragraph "24" of the Amended Complaint.

25. Defendants **DENY** the allegations contained in paragraph "25" of the Amended Complaint.

26. Defendants **DENY** the allegations contained in paragraph "26" of the Amended Complaint.

27. Defendants **DENY** the allegations contained in paragraph "27" of the Amended Complaint.

28. Defendants **DENY** the allegations contained in paragraph "28" of the Amended Complaint.

29. Defendants **DENY** the allegations contained in paragraph "29" of the Amended Complaint since Defendant Ottomanelli's Café did not employ chefs, assistant chefs or maintenance workers, but **ADMIT** employing cooks, delivery persons, food preparation workers and kitchen workers, and further **ADMIT** that many employees performed more than one job function at the same time.

30. Defendants **DENY** the allegations contained in paragraph "30" of the Amended Complaint except **ADMIT** that Plaintiff Tejada worked for Ottomanelli's Café between September 27, 2004 and November 24, 2010 at which time Ottomanelli's Café was sold.

31. Defendants **DENY** the allegations contained in paragraph "31" of the Amended Complaint but **ADMIT** that Plaintiff Tejada regularly handled goods which had been moved in interstate commerce.

32. Defendants **DENY** the allegations contained in paragraph "32" of the Amended Complaint.

33. Defendants **DENY** the allegations contained in paragraph "33" of the Amended Complaint except **ADMIT** that Plaintiff Tejada was employed by Defendant Ottomanelli's Café and regularly worked from on or about September 27, 2004 until on or about November 24, 2010 five days per week and regularly worked approximately nine hours per day.

34. Defendants **DENY** the allegations contained in paragraph "34" of the Amended Complaint and allege Plaintiff Tejada was paid a salary which varied annually during his employment but was always in excess of the minimum requirement of FLSA for an exempt employee.

35. Defendants **DENY** the allegations contained in paragraph "35" of the Amended Complaint.

36. Defendants **DENY** the allegations contained in paragraph "36" of the Amended Complaint.

37. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "37" of the Amended Complaint. To the best of Defendants' knowledge, Plaintiff Rosa did not work for Defendant Ottomanelli's Café.

38. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "38" of the Amended Complaint.

39. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "39" of the Amended Complaint.

40. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "40" of the Amended Complaint.

41. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "41" of the Amended Complaint.

42. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "42" of the Amended Complaint.

43. Defendants **DENY** knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "43" of the Amended Complaint.

44. Defendants repeat and re-allege each and every response contained in paragraphs 1 through 43 of this Answer with the same force and effect as if more fully set forth at length herein.

45. Defendants **DENY** the allegations contained in paragraph "45" of the Amended Complaint.

46. Defendants **DENY** the allegations contained in paragraph "46" of the Amended Complaint.

47. Defendants **DENY** the allegations contained in paragraph "47" of the Amended Complaint.

48. Defendants repeat and re-allege each and every response contained in paragraphs 1 through 47 of this Answer with the same force and effect as if more fully set forth at length herein.

49. Defendants **DENY** the allegations contained in paragraph "49" of the Amended Complaint.

50. Defendants repeat and re-allege each and every response contained in paragraphs 1 through 49 of this Answer with the same force and effect as if more fully set forth at length herein.

51. Defendants **DENY** the allegations contained in paragraph "51" of the Amended Complaint.

52. Defendants **DENY** the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendants **DENY** each and every paragraph of Plaintiffs' Prayer for Relief.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

54. The Amended Complaint fails to state a valid cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

55. Defendants Nicolo Ottomanelli and Joseph Ottomanelli are not employers as defined under the Fair Labor Standards Act.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

56. Defendants Nicolo Ottomanelli and Joseph Ottomanelli are not employers as defined under the New York State Labor Laws.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

57. As to Plaintiff Tejada, said Plaintiff was an exempt employee during the period at issue and therefore is not entitled to overtime compensation inasmuch as Plaintiff was employed in a bona fide executive and/or administrative capacity.

AS AND FOR A
FIFTH AFFIRMATIVE
DEFENSE

58. As an exempt employee, Plaintiff Tejada has neither standing to be a Plaintiff in this class or collective action nor does he have a claim cognizable by this Court under the Fair Labor Standards Act or the New York State Labor Laws.

AS AND FOR A
SIXTH AFFIRMATIVE
DEFENSE

59. Plaintiffs are not entitled to punitive or liquidated damages under New York State Labor Laws or the Fair Labor Standards Act because the actions and conduct of all named Defendants were at all times taken in good faith and for legitimate and lawful business reasons.

AS AND FOR A
SEVENTH AFFIRMATIVE
DEFENSE

60. Defendants pay practices are within the requirements of all applicable statutes and regulations of the New York State Department of Labor and U.S. Department of Labor.

AS AND FOR A
EIGHTH AFFIRMATIVE
DEFENSE

61. Plaintiffs are not entitled to punitive and/or liquidated damages under the Fair Labor Standards Act as the actions and conduct of Defendants were at all times taken in good faith and for legitimate and lawful business reasons. Accordingly, pursuant to the Fair Labor Standards Act, Plaintiffs' statute of limitations is two years.

AS AND FOR A
NINTH AFFIRMATIVE
DEFENSE

62. Plaintiffs' claims are barred in all or in part by the applicable statutes of limitations.

AS AND FOR AN
TENTH AFFIRMATIVE
DEFENSE

63. Plaintiffs' claims are barred in all or in part by the doctrines of waiver, laches and/or collateral estoppel.

AS AND FOR A
ELEVENTH AFFIRMATIVE
DEFENSE

64. The Amended Complaint fails to state a claim upon which relief can be granted to the extent it attempts to state a class action under Rule 23 of the Federal Rules of Civil Procedure.

AS AND FOR A
TWELFTH AFFIRMATIVE
DEFENSE

65. The Court should not exercise supplemental jurisdiction on Plaintiffs who have not opted into the Federal FLSA action.

AS AND FOR A
THIRTEENTH AFFIRMATIVE
DEFENSE

66. This action should not be certified as a class action pursuant to the FLSA since Plaintiffs will be unable to meet the criteria for numerosity, commonality, typicality, adequacy of representation and/or any other criteria sufficient to form a class or sub-class entitled to relief under state or federal law.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE

67. Plaintiffs are not entitled to a jury trial as back pay is an equitable remedy.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE

68. This action should not be certified as a collective action pursuant to the FLSA since Plaintiffs will be unable to meet the criteria for numerosity, commonality, typicality, adequacy of representation and/or any other criteria sufficient to form a collective or sub-collective entitled to relief under state or federal law.

AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE

69. Plaintiffs were properly paid for all work time but should it be determined that some hours of work were not properly paid, which is specifically denied, then such amount was negligible and, hence, was *de minimus*; the Court should not give cognizance to the amount and should deny any recovery for such claim.

AS AND FOR A
SEVENTEENTH AFFIRMATIVE
DEFENSE

70. The Defendants allege that should they have failed to pay any overtime to Plaintiffs, which is specifically denied, any omission was committed in good faith and upon reasonable grounds for believing that such act or omission was not in violation of the law. Defendants accordingly request this Court, in the exercise of its discretion, not to make an award of liquidated damages to Plaintiffs should any omission have occurred.

AS AND FOR A
EIGHTEENTH AFFIRMATIVE
DEFENSE

71. The Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims since the state law claims predominate over the federal claim.

AS AND FOR A
NINETEENTH AFFIRMATIVE
DEFENSE

72. The Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims because the conflict between Article 23's opt-out mechanism and Section 216(b)'s opt-in mechanism is an exceptional circumstance which compels the Court to decline jurisdiction.

AS AND FOR A TWENTIETH AFFIRMATIVE DEFENSE

73. The Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims because of the inherent incompatibility of opt-in collective actions and opt-out class actions.

AS AND FOR A TWENTY-FIRST AFFIRMATIVE DEFENSE

74. The Court should not allow Plaintiffs to pursue their hybrid class/collective action because the action violates the Rules Enabling Act which authorizes the United States Supreme Court to promulgate rules of procedure which cannot "abridge, enlarge or modify" a substantive right.

75. Since the FLSA, including its opt-in procedure, contains substantive rights, maintenance of a hybrid action abridges or modifies the substantive rights contained in the FLSA that the state law claims should be dismissed.

AS AND FOR A TWENTY-SECOND AFFIRMATIVE DEFENSE

76. Plaintiff Tejada cannot act as a class plaintiff because he has not filed the legally required consent under Section 216(b).

WHEREFORE, Defendants pray this Court as follows:

1. Plaintiffs have and recover nothing from Defendants;
2. That the costs of this action including any reasonable attorneys' fees be taxed against the Plaintiffs; and
3. That the Court grants such other and further relief as it deems just and proper.

Dated: Commack, New York
June 24, 2011

/s/

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